

2013 WL 8813568 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

Sarah HOUSE, by and through her Guardian Ad Litem J. Bruce House, Plaintiff,
v.

ELDER CARE ALLIANCE OF CAMARILLO, a California Corporation,
dba Alma Via of Camarillo; and Does 1-30, inclusive, Defendants.

No. 56201300431081.
July 5, 2013.

Date: July 18, 2013
Time: 8:30 a.m.
Place: Courtroom 20
Complaint filed January 24, 2013
Trial Date: Not Set

Opposition to Defendant **Elder Care Alliance of Camarillo dba Almavia of Camarillo's Demurrer to First Amended Complaint, First Cause of Action for **Elder Abuse**- Neglect; Memorandum of Points and Authorities**

Lowthorp, Richards, McMillan, Miller & Templeman, [Alan R. Templeman](#), State Bar Number 51692, [Brett C. Templeman](#), State Bar Number 224104, 300 Esplanade Drive, Suite 850, Oxnard, California 93036, Mail to: Post Office Box 5167, Oxnard, California 93031, (805) 981-8555 Telephone / (805) 983-1967 Fax, atempleman@lrmmt.com, btempleman@lrmmt.com, for plaintiff Sarah House, by and through her Guardian Ad Litem J. Bruce House.

Assigned to [Barbara Lane](#).

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Plaintiff SARAH HOUSE, by and through her guardian ad litem, Bruce J. House, hereby submits the following opposition to defendant **ELDER** CARE ALLIANCE OF AMARILLO dba AlmaVia of Camarillo's demurrer to plaintiffs First Amended Complaint, first cause of action for **elder abuse** - neglect.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff SARAH HOUSE is a 67-year-old-woman who, at all relevant times, suffered from **dementia** and **peripheral neuropathy**. Defendant ALMAVIA is a Residential Care Facility for the **Elderly**. ALMAVIA is not a healthcare provider. Based on ALMAVIA's promises that it would provide MRS. HOUSE with vigilant and proper residential care, MRS. HOUSE's family arranged for her to be cared for at ALMAVIA. Despite a regulation that required them to do so, ALMAVIA did not complete a fall risk assessment for MRS. HOUSE prior to her arrival. This is despite the fact that ALMAVIA was aware that people with **dementia** and **peripheral neuropathy** are at a great fall risk. In fact, people with **dementia** are four to five times more likely to experience falls than older people without significant cognitive impairment.

Within her first few weeks at ALMAVIA, MRS. HOUSE suffered four falls and a near fall and ALMAVIA was aware of all four falls and the near fall. Based on her condition and these falls, it was a certainty that she would fall again without steps to prevent future falls. However, ALMAVIA made a deliberate and conscious choice to do nothing to prevent future falls even though a regulation required them to do so and they knew that future falls would probably cause serious injury or death. ALMAVIA did not even take steps for MRS. HOUSE to use the wheelchair that had been provided to her by her husband

and physician. ALMAVIA chose to forego many more required fall prevention steps because doing so would have cost them money as it would have required proper staffing ALMAVIA made the deliberate and conscious decision to not adequately staff **ELDER CARE** so that it would be safe for its residents, including plaintiff. In short, defendants made a financial decision at the expense of the safety of its residents.

As was certain to happen since no steps were taken to prevent it, MRS. HOUSE fell again, this time breaking her hip. ALMAVIA's failure to take any steps to prevent this fifth fall is neglect. It also constitutes recklessness because, based on its knowledge of her condition and previous four falls in the past few weeks, ALMAVIA deliberately disregarded the high degree of probability that she would fall again and suffer an injury. ALMAVIA is also guilty of malice and oppression. All of the aforementioned facts were alleged in plaintiffs First Amended Complaint.

In its demurrer, ALMAVIA classifies this matter as a simple fall case and then argues that there has never been a case where an **elder abuse** claim has proceeded in a simple fall case. This is incorrect. In fact, there are multiple cases where an **elder abuse** cause of action was allowed to proceed along with its heightened remedies in fall cases. (See *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (June 5, 2013, B235372) Cal.Rptr.3d [13 C.D.O.S. 5747] *Norman v. Life Care Centers of America, Inc.* (2007) 107 Cal.App.4th 1233; and *In re Conservatorship of Gregory* (2000) 80 Cal.App.4th 514.)

Even if the above **elder abuse** fall cases did not exist, ALMAVIA would still be liable for **elder abuse** neglect based on the allegations in plaintiffs First Amended Complaint detailing how ALMAVIA violated multiple safety regulations and that these violations, especially the regulations concerning pre-admission appraisals and reappraisals, caused MRS. HOUSE'S injury. This is because violations of safety regulations constitute neglect under the **Elder Abuse** Act. (See *Norman v. Life Care Centers of America, Inc.* (2007) 107 Cal.App.4th 1233; and *Klein v. BIA Hotel Corp.* (1996) 41 Cal.App.4th 1133.)

II. THE PURPOSE BEHIND THE **ELDER ABUSE** STATUTES AND HEIGHTENED REMEDIES.

ALMAVIA asserts that the **elder abuse** claim does not plead proper supporting facts and allegations. Presumably, the true purpose of ALMAVIA's demurrer is to protect it from the heightened remedies of an **elder abuse** cause of action. Unlike a cause of action for negligence, pre-death pain and suffering damages (which is very relevant when the plaintiff may not live to see her matter tried) and reasonable attorney fees and costs can be awarded in **elder abuse** actions.

There is reason and purpose behind these heightened remedies. The relevant **elder abuse** code sections are based on legislative findings that infirm **elderly** persons and dependent adults are a disadvantaged class, that cases of **abuse** of these persons are seldom prosecuted as criminal matters, and that few civil cases are brought in connection with this **abuse** due to problems of proof, court delays, and lack of incentives to prosecute these suits. (See Welfare & Institutions Code § 15600(h).) The purpose of the **elder abuse** code sections is "to enable interested persons to engage attorneys to take up the cause of **abused elderly** persons and dependent adults." (Welfare & Institutions Code § 15600(j).) Like the provisions governing criminal **elder abuse**, civil **elder abuse** remedies serve the purpose of protection from **abuse** by any person without regard to their professional standing, including **abuse** in institutional care settings such as nursing facilities. (See *Delaney v. Baker* (1999) 20 Cal.4th 23, 33, 35-36; *Covenant Care, Inc. v. Sup.Ct.* (2004) 32 Cal.4th 771, 787.)

III. PLAINTIFF PROPERLY PLEAD **ELDER ABUSE** NEGLIGENCE.

A. Pleading **Elder Abuse** Neglect.

Pleading neglect in an **elder abuse** cause of action is not complicated. "Neglect" is defined at Welfare & Institutions Code § 15610.57(a)(1) as the "negligent failure of any person having the care or custody of an **elder** or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." Neglect includes the "failure to protect from health and safety hazards." (Welfare & Institutions Code § 15610.57(b)(3).) Neglect is "the failure of those responsible for

attending to the basic needs and comforts of **elderly** or dependent adults, regardless of their professional standing, to carry out their custodial obligations.” (*Delaney v. Baker, supra*, 20 Cal.4th at p. 34.)

Here, one of ALMAVIA's central arguments for a why a fall cannot be **elder abuse** is the following: “The **Elder Abuse** Act excludes liability for acts of professional negligence. (*Delaney, supra*, 20 Cal.4th at 32.) Hence, it does not apply to simple or gross negligence by healthcare providers. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 785.)” (Defendant's Demurrer at page 5, lines 16-18.) However, this line of reasoning is not applicable as ALMAVIA is not a healthcare provider, it is a residential care facility for the **elderly**. Furthermore, even if ALMAVIA were a healthcare provider, the determination between whether a healthcare provider's conduct is reckless, so as to rise to **elder abuse** neglect rather than merely negligent in cases where it is a tough call, should be left for the fact finder to decide. (See *Winn v. Pioneer Medical Group, Inc.* (2013) 216 Cal.App.4th 875, 157 Cal.Rptr.3d 124.) In *Winn*, a deceased patient's children brought an action against the decedent's physicians for **elder abuse** and the defendant physicians demurred which the trial court sustained without leave to amend. The Court of Appeal reversed this ruling. Plaintiffs had alleged that defendants' “‘conscious failure to make... a vascular referral at any time’ during period between December 8, 2008 and March 3, 2009, constituted **abuse** or neglect as defined by the **Elder Abuse** and Dependent Adult Civil Protection Act.” (*Winn v. Pioneer Medical Group, Inc., supra*, 157 Cal.Rptr.3d at 128.) The Court of Appeal further summarized the allegations as:

defendants' repeated failure, over a two-year period, to refer the decedent to a vascular specialist, despite their own diagnoses that demonstrated they knew, or should have known by a review of Mrs. Cox's medical file, that there was a strong probability of harm by the failure to provide the critically needed specialized care.

(*Id* at 135.)

In reversing the trial court's ruling, the Court of Appeal explained its reasoning:

(a) jury may view defendants' failure to refer (the decedent) to a vascular specialist as deliberate indifference to her increasingly urgent medical needs without regard for the excessive risk to which they exposed her by their failure to seek appropriate specialized care—that is, as an ‘egregious act of misconduct distinct from professional negligence’ (citation omitted).”

(*Id* at 137-138.)

Thus, in the instant matter, the central issue is whether a jury may view ALMAVIA's repeated failures to take any steps to prevent falls as deliberate indifference to MRS. HOUSE urgent safety needs without regard for the excessive risk to which they exposed her by its failure to do so. Based on the ALMAVIA's repeated conscious decisions to not take any steps after the first four falls and an almost fall (see plaintiff's First Amended Complaint at page 4, line 18 - page 6, line 11; page 6, line 14 - page 8, line 6; page 8, line 8 - page 9, line 28; page 10, line 2 - page 11, line 28; page 12 line 5 - page 14, line 1), the answer is yes.

B. Prior Case Law Includes **Elder Abuse Actions Wherein Defendants Failed to Prevent Falls.**

In re Conservatorship of Gregory (2000) 80 Cal.App.4th 514 is an **elder abuse** neglect case against a nursing home wherein plaintiff alleged **elder abuse** arising from plaintiff's injury in a fall. Plaintiff suffered a *single* fall wherein she broke her hip and shoulder. Plaintiff was allowed to proceed with her **elder abuse** cause of action and a jury found the defendant liable for **elder abuse**. The defendant appealed based on several points, including the argument that the trial court erred by allowing the use of state and federal regulations to define the standard of nursing home care. The Court of Appeal disagreed, based upon the following reasoning:

We agree with the court that (the regulations) were designed to protect nursing home residents by defining the care that was due. Given the variety of sources from which parties may draw instructions-so long as the instructions are correct statements of law-we conclude the court did not err in using the regulations to assist the jury in determining whether defendants' conduct involved physical **abuse** or neglect, or recklessness, oppression, fraud, or malice within the meaning of the **Elder Abuse** Act.

(In re Conservatorship of Gregory, supra, 80 Cal.App.4th at 523.)

In *Norman v. Life Care Centers of America, Inc.* (2007) 107 Cal.App.4th 1233, plaintiff brought an action for **elder abuse** and wrongful death based on an injury causing her mother to fall while at defendant nursing home. This subject fall followed *two other prior falls* within the past month. Plaintiff's mother had suffered from multiple health ailments, including **dementia**. Even though a some fall risk assessments had been performed, plaintiff alleged that the nursing home violated [California Code of Regulations, Title 22, section 72311](#) which required a nursing home to continue to perform an assessment of the patient's needs and promptly notifying a physician of any marked adverse change in the patient. The trial court refused to instruct the jury on negligence per se regarding this alleged violation and the jury found for the defense. The Court of Appeal reversed and remanded finding that: (1) a violation by nursing home, in its care of the resident in question, of regulations applicable to licensed skilled nursing facilities would constitute neglect under **Elder Abuse** Act; (2) instruction on negligence per se was warranted; and (3) improper refusal to instruct on negligence per se was prejudicial error. The Court of Appeal explained: Based in part on the reasoning in the foregoing cases, we conclude the regulations in question impose on (defendant's) duties of care, and a breach by (defendant) of those duties of care constitutes "[t]he negligent failure...to exercise that degree of care that a reasonable person in a like position would exercise." (§ 15610.57, subd. (a)(1), italics added.) Accordingly, a violation by (defendant) of those regulations in caring for an **elder** constitutes **elder abuse** neglect under the Act.

(Norman v. Life Care Centers of America, Inc., supra, 107 Cal.App.4th at p. 1246.)

The Court of Appeal further explained: Protection of residents from the risk of falling and suffering injuries is included within the regulations' general purpose of protecting the residents' health and safety. Because substantial evidence shows (plaintiff) suffered injuries from falling at (defendant's) facility, her injuries "resulted from an occurrence of the nature [that] the... regulation[s] [were] designed to prevent. (Evid. Code, § 669, subd. (a)(3).)

(Id at p. 1247.)

In *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (June 5, 2013, B235372) ___ Cal.Rptr.3d [13 C.D.O.S. 5747], plaintiff brought actions for negligence, **elder abuse** neglect and violation of the Patient's Bill of Rights against a skilled nursing home following plaintiff's fall wherein he suffered a **subdural hematoma**. *This fall was the ninth fall over the course of a little over a month.* Some steps had been taken to prevent these falls, but other steps were not. The jury found against the defendants on the **elder abuse** action, finding that plaintiff's injuries were the result of reckless neglect. The Court of Appeal reversed and remanded solely on the issue that the court should not have allowed into evidence the fact that the defendants had been officially cited by the Department of Public Health based on its investigation of the incident. However, there was no criticism of a fall case being brought pursuant to an **elder abuse** cause of action.

The above three cases cited above show that fall cases can proceed to a jury on an **elder abuse** neglect cause of action. The facts in *Nevarrez*. repeated falls over the course of an approximate month followed by one major injury causing fall, is very similar to the facts plead in the instant matter. The facts in the instant matter are even more egregious as ALMAVIA, unlike *Nevarrez*, did absolutely nothing to prevent future falls. These cases also touch on another important issue, per se **elder abuse** based on violations of safety regulations, which is discussed in further detail in the below section.

C. Violations of Safety Regulations Constitute Neglect Under the **Elder Abuse Act**.

In *Klein v. BIA Hotel Corp.* (1996) 41 Cal.App.4th 1133, the plaintiffs' wrongful death action was based on the defendant's alleged negligence in caring for their mother in a residential hotel facility for the **elderly**. The complaint alleged multiple causes of action for negligence in the running of defendant's residential care facility, all of them based on defendant's alleged failure to comply with Title 22 of the California Code of Regulations. "Plaintiffs allege these violations of the regulations were the proximate cause of their damages and further allege that under [Evidence Code section 669](#), defendant is presumed to be negligent." (*Klein v. BIA Hotel Corp.*, *supra*, 41 Cal.App.4th at p. 1137.) The trial court granted the defendant's motion for summary judgment, concluding the defendant did not have a duty to exercise reasonable care to prevent the plaintiffs' mother from committing suicide by jumping off the roof of its five-story facility. (*Id.* at p. 1135.) On appeal, plaintiffs contended, inter alia, that the "defendant had a duty of care to [their mother] to prevent her death" based on the regulations that govern residential care facilities. (*Id.* at p. 1139.) The Court of Appeal explained:

[Plaintiffs' mother] took her life at a facility where defendant was required by law to monitor, to some degree, her health and well-being, to inform certain persons of changes in her condition, and to determine whether the facility would be able to continue to care for her because of those changes. The obligations imposed on defendant were obviously designed to prevent [her] mental and physical problems from going unnoticed and untreated, so that harm to [her] could be avoided.

(*Id.* at p. 1140.)

It further stated:

[W]e focus on the fact that defendant had duties under the regulations which, if followed, may have prevented decedent's death. Decedent was a member of the class of persons designed to be protected by the regulations. Clearly, the regulations were designed to protect residents of residential care facilities for the **elderly** from, among other things, harm such as decedent experienced. Clearly[,] plaintiff's 'loss resulted 'from an occurrence of the nature which the [regulations were] designed to prevent.' ([Evid. Code, § 669](#).) By taking decedent as a resident at its care facility, defendant agreed, for her benefit, to abide by the regulations. Thus, defendant had the duty to exercise the care called for in those regulations."

(*Id.*, at p. 1141.)

The court reversed the summary judgment, noting that on remand there could be resolution of the factual questions whether the defendant complied with the regulations and, if not, whether its breach of its duty of care was a substantial factor in causing the decedent's death. (*Id.* at p. 1142.)

As previously addressed in the previous section, in *In re Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, the Court of Appeal held that "the (trial) court did not err in using the regulations to assist the jury in determining whether defendants' conduct involved physical **abuse** or neglect, or recklessness, oppression, fraud, or malice within the meaning of the **Elder Abuse Act**." (*In re Conservatorship of Gregory*, *supra*, 80 Cal.App.4th at 523.)

Also as previously discussed in the previous section, in *Norman v. Life Care Centers of America, Inc.* (2007) 107 Cal.App.4th 1233, 1246 the Court of Appeal held that "a violation by (defendant) of those regulations in caring for an **elder** constitutes **elder abuse** neglect under the Act." The Court of Appeal further explained:

Because (the decedent) was a resident of (defendant's) licensed skilled nursing facility, she was a member of the "class of persons for whose protection the ... regulation[s] [were] adopted." ([Evid. Code, § 669, subd. \(a\)\(4\)](#).) Furthermore, the regulations clearly were intended to protect the health and safety of nursing home residents by requiring the initial development and updating of appropriate care plans for them and notification of their physicians if there is any change in their conditions. There could be no

other substantive purpose for those regulations other than to protect the health and safety of nursing home residents. Protection of residents from the risk of falling and suffering injuries is included within the regulations' general purpose of protecting the residents' health and safety. Because substantial evidence shows (the decedent) suffered injuries from falling at (defendant's) facility, her injuries "resulted from an occurrence of the nature [that] the ... regulation[s] [were] designed to prevent.

(*Norman v. Life Care Centers of America, Inc.*, *supra*, 107 Cal.App.4th at p. 1247.)

In the instant matter, MRS. HOUSE plead that she suffered **elder abuse** as a result of ALMAVIA' s violations of the following regulations: [Title 22, Division 6, Chapter 8, section 87457](#) - Pre-admission Appraisals; [Title 22, Division 6, Chapter 8, section 87463](#) -Reappraisals; [Title 22, Division 6, Chapter 8, section 87464](#) - Basic Services; [Title 22, Division 6, Chapter 8, section 87466](#) - Observation of the Resident; [Title 22, Division 6, Chapter 8, section 87468](#) - Personal Rights; [Title 22, Division 6, Chapter 8, section 87565](#)- Adequate Staffing Levels. (See plaintiff's First Amended Complaint at page 15, lines 5 -15.) Again, "(p)rotection of residents from the risk of falling and suffering injuries is included within the regulations general purpose of protecting the residents' health and safety." (*Id.* at p. 1247.) Here, it is clearly alleged in the First Amended Complaint that ALMAVIA's violated these regulations and that these violations caused her harm. Based on the holdings of *Klein, In re Conservatorship of Gregory and Norman*, a violation by of these regulations in caring for an **elder** constitutes **elder abuse** neglect under the Act.

D. Pleading Conclusions of Law and Ultimate Facts.

"It is, of course, the rule that ultimate facts must be pleaded, rather than legal conclusions, yet the distinction between ultimate facts and conclusions of law is not always clear or easy to state." (*Dino, Inc. v. Boreta Enterprises, Inc.* (1964) 226 Cal.App.2d 336, 340.) In *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, the court stated:

The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree. [Citations.] For example, the courts have permitted allegations which obviously included conclusions of law and have termed them "ultimate facts" or "conclusions of fact." [Citations.] In permitting allegations to be made in general terms the courts have said that the particularity of pleading required depends upon the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff, and that less particularity is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff. [Citations]

(*Burks v. Poppy Construction Co.*, *supra*, 57 Cal.2d at p. 473-474.)

Intent and knowledge are ultimate facts that may be alleged generally. (See *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 803.)

A simple cursory review of MRS. HOUSE' s eighteen page First Amended Complaint will reveal that it is extremely fact specific in how ALMAVIA failed her and committed **elder abuse**. In accordance with the above cases, ALMAVIA has more than enough facts to discern the allegations in plaintiffs First Amended Complaint.

IV. CONCLUSION.

Due to her history of falls, it was a certainty that MRS. HOUSE would fall and seriously injure herself without ALMAVIA taking steps to prevent such a fall. However, ALMAVIA chose not to so, which constitutes neglect. **Elder abuse** neglect cases

regarding falls have been allowed to proceed with far less facts than those alleged in the First Amended Complaint. Furthermore, violations of safety regulations, which was plead in detail in the First Amended Complaint, in caring for an **elder** constitutes **elder abuse** neglect under the **Elder Abuse** Act.

Based on the foregoing, plaintiff respectfully requests that the court deny defendant's demurrer, or in the alternative, give plaintiff leave to amend.

Dated: July 3,2013.

Respectfully submitted,

LOWTHORP, RICHARDS, McMILLAN, MILLER & TEMPLEMAN A PROFESSIONAL CORPORATION

By:

ALAN R. TEMPLEMAN

BRETT C. TEMPLEMAN

Attorneys for Plaintiff SARAH HOUSE, by and through her Guardian Ad Litem J. Bruce House